IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

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No. 71-364

JOAN S. MAHAN, SECRETARY, STATE BOARD OF ELECTIONS, *et al.*,

Appellants,

v.

HENRY E. HOWELL, JR., *et al.*,

Appellees.

No. 71-373

CITY OF VIRGINIA BEACH,

Appellant,

v.

HENRY E. HOWELL, JR., *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEE CLIVE L. DuVAL, 2D

Of Counsel:

EDMUND D. CAMPBELL, Esq.
Suite 822, 1425 H St., N.W.
Washington, D.C. 20005

CLIVE L. DuVAL, 2D
2007 North 15th Street
Arlington, Virginia 22201

Appellee pro se

Washington, D.C. • THIEL PRESS • (202) 393-0625

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

BRIEF OF APPELLEE CLIVE L. DuVAL, 2D

STATEMENT OF THE CASE

The appeals in this case are taken from an interlocutory order of the United States District Court

for the Eastern District of Virginia reapportioning the House of Delegates and Senate of the Virginia General Assembly. The order and the opinion of the Court below are reported in *Howell v. Mahan*, 330 F. Supp. 1138 (E.D. Va. 1971) and are set forth in J.A. 1-25.

Appellants, defendants below, include the Secretary of Virginia's State Board of Elections and the members thereof. Another appellant is the defendant intervenor City of Virginia Beach. Appellees, including this appellee DuVal, plaintiffs below, are registered and qualified voters of Virginia.

The instant appeals arise out of three separate suits brought by plaintiffs in the District Court seeking to enjoin the State Board of Elections and other Virginia officials from conducting elections in 1971 to the Virginia General Assembly from House of Delegates and Senate districts constructed by the Virginia legislature.

The act challenged by DuVal and other residents of Northern Virginia[1] in *DuVal v. Prichard*[2] and by Parris, *et al.* in *Parris v. Prichard*[3] divided the 100-member House of Delegates into fifty-two legislative districts.[4]

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[1]As used herein, Northern Virginia means the Counties of Arlington, Fairfax, Loudoun and Prince William and the Cities of Alexandria, Fairfax and Falls Church. For certain State purposes, these jurisdictions are grouped in State Planning District Eight (A. 67, p. 2).

[2]Filed in the Richmond Division as Civil Action No. 174-71-R (App. 47-64) on March 8, 1971. *DuVal* complaint is set forth at A. 47-64.

[3]Filed in the Alexandria Division as Civil Action No. 111-71-A (App. 14-27) on March 22, 1971. *Parris* complaint is set forth at A. 14-28.

[4]Chap. 116 of 1971 Acts of Assembly (J.A. 27-30).

That attacked by Howell, *et al.* in *Howell v. Mahan*[5] divided the Senate into forty single member districts.[6] The *DuVal* and *Parris* suits alleged that the 1971 House of Delegates reapportionment statute created many districts with substantial and constitutionally impermissible disparities in population, and that most Northern Virginia districts were seriously under-represented. Plaintiffs in these two actions did not challenge the 1971 Senate reapportionment act.

According to final 1970 census figures, the populations of the fifty-two House of Delegates districts created by the Virginia General Assembly varied from 39,991 per House seat or 14% below the optimum population of 46,485 per House seat to 50,964, 9.6% above the optimum. The difference in population between the smallest and largest House seats was 10,973 or 23.6% (A. 39; J.A. 4, footnote; brief of Appellants Mahan *et al.*, p. 7; plaintiff DuVal's trial brief, p. 2, and exhibit PX-11, p. 6, in District Court).

Virtually every House seat in Northern Virginia was under-represented. Except for Alexandria's seats,[7] all House seats in Northern Virginia were under-represented from 3.9% to 6.3%. Including Alexandria, each House seat in Northern Virginia was under-represented an average of more than 4.3% per seat (A. 39-40; J.A. 10, footnote). Northern Virginia as an area was represented

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[5] Filed in the Norfolk Division as Civil Action No. 105-71-N (App. 93-110) on March 3, 1971. *Howell* complaint is set forth at A. 95-109.

[6] Chap. 120 of 1971 Acts of Assembly.

[7] Alexandria's seats (Twenty-first district, plus Twenty-third "floater" district with the equivalent of 2.39 seats) were close to optimum population, being over-represented by 0.1% (J.A. 10).

by nineteen Delegates, one less than it was entitled to population-wise. Conversely, most of the jurisdictions in the Tidewater area[8] were over-represented. During the 1960-1970 decade, the average annual growth rate of Northern Virginia was more than triple that of the Tidewater, and during the 1970-80 decade it is estimated to be 2.4 times that of the Tidewater area.

The three suits brought below were consolidated for trial in the District Court and set for hearing on May 24, 1971.

On May 7, 1971, the United States Attorney General, acting pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. Sec. 1973 (c), objected to the multi-member House districts in five urban areas and also objected to the line demarcating the boundary between the 5th and 6th Senatorial Districts in Norfolk (J.A. 51-53).

The hearing on May 24 was devoted to arguing the effect of the Attorney General's objection. The court thereupon entered an "Order on First Hearing" (J.A. 43-46) providing: (1) that the trial of the three suits be continued to allow Virginia an opportunity to obtain approval of a reapportionment plan from the United States District Court for the District of Columbia, as provided in the Voting Rights Act, (2) that the primary elections originally set for June 8, 1971, be postponed until September 14, 1971, and (3) that the court would proceed with trial of the three suits and thereafter itself

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[8]As used herein, Tidewater area means the Counties of Isle of Wight, Nansemond and Southampton and the Cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk and Virginia Beach. For certain State purposes, these jurisdictions are grouped in State Planning District Twenty (A. 67, p. 4).

formulate a reapportionment plan resolving valid objections, if any, of the plaintiffs, unless prior to June 15, 1971, Virginia had submitted a reapportionment plan to the United States Attorney General for his approval or had sought a declaratory judgment from the United States District Court for the District of Columbia.

Before the June 15 deadline, this Court handed down its opinion in *Whitcomb v. Chavis*, 403 U.S. 124, 91 S. Ct. 1858, 29 L.Ed. 2d 363 (June 7, 1971). Thereupon, the Attorney General withdrew his objection to the reapportionment plan for the House of Delegates (J.A. 53). On June 14, 1971, the General Assembly adopted Chapter 246, Acts of Assembly of 1971 (J.A. 31-43), which amended Chapter 120 to revise the line between the Fifth and Sixth Senatorial Districts, thereby eliminating the Attorney General's sole objection to the reapportionment plan for the Senate (J.A. 54-55).

The trial of the three actions below was heard by the consolidated District Court on June 16, 1971.

On July 2, 1971, the District Court filed an opinion (J.A. 1-22) and entered an interlocutory order (J.A. 23-25), holding the redistricting plans enacted by the General Assembly invalid as violating the Equal Protection Clause of the United States Constitution. The District Court's opinion included a reapportionment plan for both the House of Delegates and the Senate.

With regard to the Assembly's Senate reapportionment plan the Court made only one change, converting three single member Senatorial districts serving Norfolk and a portion of Virginia Beach into a multi-member district.

The Court's plan for the House of Delegates consisted of the General Assembly's redistricting proposal with necessary amendments to some of the legislative districts.

Twenty-six of the fifty-two House of Delegate districts were altered; the balance were left untouched. The most significant change was to transfer one Delegate seat from the Tidewater area to Northern Virginia to correct the under-representation of the latter region. In this connection, the Court said (J.A. 18):

> This is the only instance in which a delegate is transferred from one sector of the State to another. It is justified by the pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater, as earlier explained.

The District Court further stated (J.A. 21-22):

> While we have endeavored to reach a perfect mathematical division, we have been unable to do so because of the multiplicity of delegates, the geography of the State and the diversity of population concentrations. The highest degree of under-representation is 3.8% (Thirty-eighth), with the largest over-representation 3.4% (Thirty-third, Thirty-fourth and Thirty-fifth).

The Court footnoted this statement (J.A. 22, footnote 8) by pointing out that "In this arithmetic Accomack and Northampton counties have not been included. The new reapportionment has not involved them because of their isolation from the remainder of the State. They make up the narrow peninsula separated from Virginia's mainland by Chesapeake Bay and the Atlantic Ocean. Their exception does not materially affect the submitted plan." These two counties (Forty-sixth district, with one Delegate) were over-represented by 6.5% (J.A. 15-16). Thus, total variation under the Court's plan between smallest and largest Delegate districts was 7.2%[9] if the Forty-sixth district was not included and 10.3% if it was.

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[9]Actually, 8.3% if "floater" districts were given weight; see footnote 9 to Court's opinion (J.A. 22).

The opinion of the four judges sitting as three-judge District Courts was substantially unanimous (Judge Lewis filed a separate concurring and dissenting opinion, fully agreeing with all aspects of the ruling except for the Court's refusal to place all of Fairfax County in one eleven-member district).

Following issuance of the opinion and interlocutory order of the District Court on July 2, 1971, two lower court judges were requested to stay the order of the District Court but refused to do so. Applications were then made to this Court for a stay of the judgment and order of the lower court, but on July 27, 1971 Mr. Justice Black, Acting Circuit Justice, refused to do so (*Mahan v. Howell*, 404 U.S. 1201, 92 S.Ct. 1, L.Ed.2d (1971), stating in part as follows:

> The case is difficult; the facts are complicated; the four district court judges deciding the case had no difficulty in reaching their conclusion on the constitutional questions or in devising a plan to correct the deficiencies they found; the delay incident to review might further postpone important elections to be held in the State of Virginia should the stay be granted. These and other considerations which need not be stated lead me to believe that four Members of the Court are not likely to grant an appeal and therefore I decline to enter an order which would in effect stay the judgment of the consolidated three-judge court. 92 S.Ct. at 2.

Elections to the General Assembly were held on November 9, 1971, under the District Court's plan. Delegates and Senators were elected and sworn into office, and the Assembly as reconstituted under the Court's plan conducted the Commonwealth's legislative affairs at the regular session held January-March, 1972.

The next session of the General Assembly will be held January-February, 1973. No elections for the General Assembly are scheduled until the Fall of 1973.

SUMMARY OF ARGUMENT

I

This Court has held that there must be an honest and good faith effort to construct legislative districts as nearly of equal population as is practicable, and that only minor deviations from population equality can be justified. The deviations from population equality contained in the 1971 House of Delegates reapportionment act (14% below the population norm per seat to 9.6% above, total 23.6%) are not minor and manifestly are of such magnitude that they are constitutionally impermissible.

II

The Commonwealth of Virginia has disregarded the boundary lines of political subdivisions in its Congressional, Senate and House of Delegates redistricting plans. Further, the Virginia Constitution requires that *every* electoral district, legislative as well as Congressional, shall be constituted on the equal population principle. Therefore, Virginia no longer has a tradition or custom of maintaining the integrity of political subdivisions in reapportionment statutes, and the State can no longer seek to justify the large deviations from population equality contained in the 1971 House of Delegates reapportionment act on that basis.

III

Almost every House seat in Northern Virginia was under-represented in the General Assembly's 1971 House of Delegates reapportionment plan; and as an area, Northern Virginia received one less Delegate seat than its population merited, despite the fact that it was and is by far the fastest growing region in the State. In contrast, most of the seats in the Tidewater area of Virginia were over-represented, while growth rates for all Tidewater jurisdictions were far smaller than those of Northern Virginia counties and cities. The District Court summarized this situation as one of "pervasive under-representation in districts of Northern Virginia, and over-representation in Tidewater" (J.A. 18). Under rulings of this Court, the 1971 House of Delegates reapportionment plan was plainly unconstitutional because it was an apportionment structure which discriminated against one geographic area of Virginia and conversely had a "built-in bias" favoring other geographic areas of the Commonwealth, particularly the Tidewater.

IV

Because time was of the essence, the District Court did not have time to refer the House of Delegates reapportionment plan back to a stubbornly resisting General Assembly, subsequently review whatever new plan the Assembly adopted, correct such plan as necessary, and order it into effect—at least without seriously interfering with Virginia's election processes. Under rulings of this Court, the lower court had wide latitude to correct apportionment inequities, and in so doing it was fully entitled to consider population growth trends throughout

Virginia. The District Court's plan, which restored a Delegate seat to Northern Virginia and in other respects significantly reduced the dilution of Virginians' right to vote, is a reasonable one and meets all constitutional tests laid down by this Court.

V

The General Assembly elected in November, 1971 under the lower court's reapportionment plan is the only legislature the Commonwealth has. If this Court were now to declare such plan invalid and reinstate the General Assembly's reapportionment plans, the result would presumably be to oust present members of the legislature. Such an effort to unscramble the eggs could accomplish no useful purpose and would create a legislative vacuum in Virginia. Further, the lower court has retained jurisdiction in this matter. Thus, the General Assembly could, if it desires, enact a new House of Delegates reapportionment plan, which could and presumably would be submitted for review to the District Court. If any such new plan is approved or modified by the District Court and appeals are again taken to this Court, this Court would then have before it an appeal from a *final* judgment rather than from an *interlocutory* one, as is the case on these appeals. If, on the other hand, the General Assembly fails to enact a new House of Delegates redistricting statute, this would indicate that the legislature no longer feels that the lower court's plan is unacceptable. As a practical matter and under the circumstances here present, it is unnecessary and undesirable for the Supreme Court to give further consideration to this case at this stage.

ARGUMENT

I

THE POPULATION DEVIATIONS IN THE GENERAL ASSEMBLY'S 1971 HOUSE OF DELEGATES REDISTRICTING PLAN EXCEED THOSE CONSTITUTIONALLY PERMISSIBLE UNDER THIS COURT'S RULINGS

The General Assembly's 1971 House of Delegates redistricting plan arranged the one hundred members of the House in fifty-two districts, including single member, multi-member, and four "floater" districts of one Delegate each. The "floater" districts were the Twenty-third, Thirty-fifth, Forty-second, Fifty-second (J.A. 10, 13, 14, 15, 17; J.A. 27-30). To determine accurately the plan's deviations from the optimum population per seat, it is of course, necessary to give weight to all seats, including the four "floater" seats. A simple method of so doing[10] was agreed upon in the Court below between appellee DuVal and the Virginia Attorney General, counsel for appellants Mahan *et al.* The Supreme Court has indicated approval of this method of valuing "floater" seats in *Kilgarlin v. Hill,* 386 U.S. 120, 121, 87 S.Ct. 820, 821, 17 L.Ed. 2d 771 (1967), which affirmed

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[10] For example, Alexandria (Twenty-first district) was represented under the Assembly plan by two Delegates; Arlington (Twenty-second) by three Delegates. In addition, the two jurisdictions shared a floater delegate (Twenty-third). Therefore, Alexandria was and is represented mathematically by two Delegates plus a .29 share of the floater district—that being the proportion Alexandria's population (110,938) bears to the total population of the floater district (285,222). Arlington, in turn, was and is represented by the equivalent of 3.61 Delegates. A further description of this method of valuing "floater" seats appears at A. 81-82.

in part and reversed in part *Kilgarlin v. Martin*, 252 F. Supp. 404 (S.D. Texas 1966); see discussion of "flotorial" districts at 252 F. Supp. 419-424.

Applying this agreed method of weighting "floater" districts, the Virginia legislature's plan produced differences in population between the largest and smallest House seats of 23.6%—*not* 16.4% as appellant City of Virginia Beach consistently and inaccurately contends. Appellants Mahan *et al.* concede that the total variance is 23.6% (Brief of appellants Mahan *et al.*, p. 7). More specifically, as heretofore stated, the population represented by a House seat varied from 39,991, which is 14% below the correct mathematical figure of 46,485 to 50,964, which is 9.6% above. The difference in population between the smallest and largest House seats was 10,973 (A. 39; J.A. 4 footnote, plaintiff DuVal's trial brief, p. 2 and exhibit PX-11, p. 6 in District Court).

Appellee submits that under recent rulings of this Court deviations as large as those in the General Assembly's Delegate redistricting plan are without justification and are constitutionally impermissible under the Equal Protection Clause of the Fourteenth Amendment.

In *Reynolds v. Sims*, 377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964), the Supreme Court stated (377 U.S. at 577) that the Equal Protection Clause requires a State to make "an honest and good faith effort to construct districts, in both houses of the legislature, as nearly of equal population as is practicable." The Court added (578) that "Somewhat more flexibility may ... be constitutionally permissible with respect to state legislative apportionment than in congressional districting." The Court further indicated in *Reynolds* that a state might legitimately desire to maintain the integrity of

political subdivisions and thus cause some variations in the population of legislative districts, "*so long as . . . the equal-population principle was not diluted in any significant way.*" (377 U.S. at 578–emphasis supplied). The Court also made it clear that it would not set as constitutionally acceptable or unacceptable any fixed standard of percentage deviations from population norms for legislative districts (578).

In keeping with the underscored language of Reynolds, *supra*, this Court has not looked with favor on deviations from population equality in constructing legislative districts of the magnitude here involved.

In *Abate v. Mundt*, 403 U.S. 182, 91 S.Ct. 1904, 29 L.Ed.2d 399 (1971), the plan before this Court was one developed by the Rockland County Board of Supervisors reapportioning the County Board. The plan resulted in deviations from the population norm of 7.1% above to 4.8% below, for a total deviation of 11.9%. A divided Court upheld the plan, stating that the need for flexibility, the desire to preserve the integrity of political subdivisions, and the limited number of the representatives involved "lend support to the argument that slightly greater percentage deviations may be tolerable for local government apportionment schemes than in the case of their State or national counterparts." 403 U.S. at 185, 91 S. Ct. at 1907, 29 L.Ed.2d at 402-403. In the course of the opinion, the Court set down certain criteria for legislative apportionment:

> It is well established that electoral apportionment must be based on the general principle of population equality and that this principle applies to state and local elections, *Avery v. Midland County*, 390 U.S. 474, 481, 88 S. Ct. 1114, 1118, 20 L.Ed. 2d 45 (1968). "Mathematical exactness or precision is

> hardly a workable constitutional requirement," *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S. Ct. 1362, 1389, 1390, 12 L.Ed. 2d 506 (1964), but deviations from population equality must be justified by legitimate state considerations, *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572, 17 L.Ed. 2d 501 (1967). Because voting rights require highly sensitive safeguards, this Court has carefully scrutinized state interests offered to justify deviations from population equality. 403 U.S. at 184-185.

The court concluded with the following significant statement:

> We emphasize that our decision is based on the long tradition of overlapping functions and dual personnel in Rockland County government and on the fact that the plan before us does not contain a built-in bias tending to favor particular political interests or geographic areas. *And nothing we say today should be taken to imply that even these factors could justify substantially greater deviations from population equality.* (Emphasis supplied). 403 U.S. at 187.

Two dissenters (Justices Brennan and Douglas) found the deviations unjustifiable, citing in support *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S. Ct. 1225, 22 L.Ed.2d 519 (1969), and *Wells v. Rockefeller*, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 519 (1969), involving Congressional redistrictings.

The clear inference of *Abate* is that the deviations it upheld (11.9% between largest and smallest districts) are about the maximum permissible for local governments; further, that something *considerably less* in deviations from the population norm is the maximum that adherence to the lines of political subdivisions could justify for a State legislature.

Connor v. Williams, 404 U.S. 549, 92 S. Ct. 656, 30 L.Ed.2d 704 (1972), involved a court-made plan reapportioning the Mississippi legislature. The plan contained a total variance of 18.9% between the largest and smallest Senate districts and of 19.7% between the largest and smallest House districts. The Supreme Court concluded that an election already held under this plan should not be upset, because of the necessity that there be government. But it is significant that the deviations in the scheme for the Mississippi legislature—which are less than those in the Virginia House of Delegates plan—were not approved by the Supreme Court.

In *Kirkpatrick v. Preisler* and *Wells v. Rockefeller, supra,* the Supreme Court struck down Congressional redistricting plans with total variations between largest and smallest districts of 5.97% and 13.1%, respectively, stating in the former:

> [The Constitution] permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown. 394 U.S. at 531.

While these cases may not strictly control the present appeals since they do not involve legislative apportionment, this Court has indicated that they raise serious questions as to whether large variances in State legislative plans, in the range of those found in the General Assembly's 1971 House of Delegates redistricting act, are constitutionally permissible.

Referring to *Preisler* and *Wells,* this Court said in *Connor v. Williams, supra:*

> These decisions do not squarely control the instant appeal since they do not concern state legislative apportionment, but they do raise substantial ques-

tions concerning the constitutionality of the District Court's plan as a design for permanent apportionment. 92 S. Ct. at 658.

In *Kilgarlin v. Hill, supra,* this Court, reversing the judgment of the lower court in part, found fault with a portion of the District Court's decision "accepting a general county-line justification" for deviations involving over-representation of two legislative districts by 8.6% and 9.2% respectively, and two others by 13% and 13.3% (386 U.S. at 124; see *Kilgarlin v. Martin, supra,* 252 F. Supp. 404 at 424).

As mentioned earlier, the Supreme Court speaking in *Reynolds v. Sims, supra,* said that it would not spell out any precise constitutional tests as to what population variations were or were not permissible in legislative reapportionment cases. The Court added:

> Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation.
>
> * * * * *
>
> Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative reapportionment. 377 U.S. at 578.

As the Court foresaw, the state and lower federal courts have proceeded to work out just such standards.

There follows a series of court decisions in which state legislative and local government redistricting plans involving *smaller* deviations than the 1971 Virginia House of Delegates plan were *disapproved* by state and lower federal courts:

Cummings v. Meskill, 341 F. Supp. 139 (D. Conn. 1972). (Reapportionment plan for Connecticut legislature having deviations of 3.93% above to 3.90% below in the House (total 7.83%) and .88% above to .93% below in the Senate (total 1.81%) disapproved.)

In re Legislative Districting of General Assembly, 193 N.W.2d 784 (Iowa 1972). (Reapportionment plan for Iowa legislature having total variance of 3.83% in House and 3.2% in Senate held invalid.)

Graves v. Barnes and related cases, Civil Action No.'s A-71-CA-142, 143, 144 and 145, F. Supp. (W.D. Texas 1972). (Reapportionment plan for Texas House of Representatives having deviations of 5.8% above to 4.1% below (total 9.9% rejected.)

Troxler v. St. John the Baptist Parish Police Jury, 331 F. Supp. 222 (E.D. La. 1971). (Reapportionment plan for local governing body having a total population variance of 6.2% rejected.)

In re Legislative Districting of General Assembly, 175 N.W.2d 20 (Iowa 1970). (Deviations of 7.3% above to 5.7% below in the House (total 13%) and 6.6% above to 5.5% below in the Senate (total 12.1%) disapproved.)

Driggers v. Gallion, 308 F. Supp. 632 (M. D. Ala. 1969). (Reapportionment plan for County Board of Commissioner districts held invalid where there was a 10% variance between smallest and largest districts.)

Skolnick v. Ill. State Electoral Board, 307 F. Supp. 698 (N.D. Ill. 1969). (Deviations of 8.6% above to 8.3% below in the House (total 16.9%) and 7.7% above to 7.0% below in the Senate (total 14.7%) held invalid.)

Long v. Docking, 282 F. Supp. 256 and 283 F. Supp. 539 (D. Kan. 1968). (Total variance between largest and smallest Senate districts of 16.6% held invalid.)

As indicated by these decisions, the state and lower federal courts have marched steadily in the direction of requiring equality of population among legislative districts, regardless of attempts made in the several cases to justify various deviations.

This is in keeping with the guideline laid down by this Court in *Roman v. Sincock*, 377 U.S. 695, 84 S.Ct. 1449, 12 L.Ed.2d 620 (1964), that "minor deviations only" from the principle of population equality can be justified. In that case, this Court said:

> Rather, the proper judicial approach is to ascertain whether, under the particular circumstances existing in the individual State whose legislative apportionment is at issue, there has been a faithful adherence to a plan of population-based representation, *with such minor deviations only as may occur in recognizing certain factors that are free from any taint of arbitrariness or discrimination.* 377 U.S. at 710 (emphasis supplied).

Quoted in *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572, 17 L.Ed. 2d 501 (1967).

The deviations from population equality contained in the 1971 House of Delegates act (14% below to 9.6% above, total 23.6%) are manifestly not minor. Hence they cannot be justified and are constitutionally impermissible.

II

THE DEVIATIONS IN THE 1971 HOUSE OF DELEGATES REAPPORTIONMENT PLAN CANNOT BE JUSTIFIED ON THE GROUNDS OF AN EXISTING TRADITION TO PRESERVE THE INTEGRITY OF POLITICAL SUBDIVISIONS

The first Virginia reapportionment case, *Mann v. Davis*, 213 F. Supp. 577, came before a special three-judge court in the Eastern District of Virginia in 1962, some two years before the Supreme Court decided *Reynolds v. Sims, supra*. In rejecting the legislative reapportionment plan developed by the General Assembly the Court said:

> Plaintiffs here proved the inequity of the allotment of representatives on the basis of population. Thereupon the burden to adduce evidence of the presence of other factors which might explain this disproportion passed to the defendants. 213 F. Supp. at 584.

In affirming this decision (*Davis v. Mann*, 377 U.S. 678, 84 S. Ct. 1441, 12 L.Ed.2d 609 (1964)), the Supreme Court noted that the State had attempted to justify the mathematical inequity in its reapportionment on the ground of Virginia's then existing "tradition of respecting the integrity of the boundaries of cities and counties in drawing district lines." 377 U.S. at 686. However, the Court found that the population variations between districts were too great to be justified by such an alleged custom.

In the case at bar, appellants again assert as a defense against appellees' claim of inequity in the allotment of legislators the same one put forward in *Davis v. Mann, supra*—namely, that the inequity is necessary to preserve Virginia's alleged tradition of respecting the integrity of

the boundaries of cities and counties in drawing district lines. But this defense is no longer available in the case of the Commonwealth for the reasons set forth below:

(1) In 1970 the voters of Virginia approved an amended State Constitution which contains the following significant provision (Article II, Section 6) dealing with the apportionment of electoral districts for both members of Congress and for members of the General Assembly:

> *Apportionment.* Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 1971 and every ten years thereafter.

Thus, there are not only no provisions in Virginia's Constitution requiring reapportionment plans to conform to county and city lines, but the new Constitution makes no distinction whatever between the standards for Congressional and legislative districts. Both must be composed of "contiguous and compact territory and . . . so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." It necessarily follows that the boundaries of political subdivisions must yield for legislative reapportionment as readily as for Congressional redistricting if this is necessary to carry out the constitutional mandate.

(2) As a result of a court challenge to Virginia's Congressional district plan, the General Assembly on March 11, 1972, adopted a new redistricting plan subsequently judicially approved and now in effect. Under this plan, the Assembly found it necessary to disregard the boundary lines of the Counties of Chesterfield, Fairfax and Stafford and the City of Virginia Beach in order to develop Congressional districts of approximately equal population (total deviation from the norm is less than 1%).[11]

(3) Twenty-five of the forty State Senatorial districts contained in the 1971 Senate reapportionment plan (A. 31-43) ignore county and city lines. Total deviation in the Senate plan is 9.7% (J.A. 56-62).

(4) The 1971 House of Delegates reapportionment plan divides Fairfax County in two parts (J.A. 28). Further, the Delegate reapportionment act Sepcifies (J.A. 30):

> Reference to a county or city herein shall, unless otherwise specifically provided, be construed to mean the territory comprising such county or city as it exists on the effective date of this enactment *notwithstanding future boundary changes by annexation, merger, consolidation or the voiding of boundary changes heretofore made final.* (Emphasis supplied).

Thus, the act clearly contemplates the division of counties and cities among House of Delegates districts either by reason of future annexations or otherwise, or by the voiding of boundaries changes.

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[11] *University of Virginia Newsletter*, Vol. 48, No. 11 of July 15, 1972, entitled "Congressional Redistricting in Virginia." Code Section 24.1-4.2.

For example, if the past annexation by the City of Richmond of a portion of Chesterfield County (now under review in the Federal courts) is reversed, the Thirty-third district with five Delegates will be composed of the City of Richmond and a part of Chesterfield County, and the Thirty-fifth "floater" district will also include a portion of Chesterfield County. Thus, the integrity of the boundary lines of Chesterfield will be disregarded.

Similarly, if in the annexation action involving the City of Petersburg against the Counties of Dinwiddie and Prince George, the annexation of a portion of the Counties ordered by a Virginia court (also now under review in the Federal courts) is reversed, the Thirtieth district[12] will be composed of Petersburg City and portions of said two Counties. Thus County lines will again be violated under the provisions of the 1971 House of Delegates redistricting plan. Conversely, several suits by Virginia cities to annex portions of adjacent counties are now in Virginia courts. If in any of these cases, a city is judicially permitted to annex a portion of any county, then the legislative district which is now defined by county lines would cross city lines to include a portion of the expanded city (i.e. that portion of the county which became part of the city by judicial decree).[13]

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[12]The Thirtieth district is described in the 1971 House of Delegates reapportionment act as follows: "Thirtieth.–Petersburg, including those portions of Prince George's and Dinwiddie Counties as described in the court's opinion in the annexation suit of Petersburg against the counties of Prince George's and Dinwiddie, one [delegate]" (J.A. 29).

[13]For a discussion of judicial annexation in Virginia, see *University of Virginia Newsletter*, Vol. 48, No. 9 of May 15, 1972 entitled "Municipal Annexation in Virginia 1960-1970."

(5) Appellants also intimate that the reapportionment statutes enacted by the General Assembly at the 1971 special session were the result of joint decisions mutually arrived at by Senate and House leaders to achieve a reapportionment "balance" by redistricting the upper House on a single member basis and the lower house on a largely multi-member basis.

Of course, this is not so. The Senate, which regularly sought the advice of the Attorney General of the Commonwealth in its redistricting considerations, independently arrived at a single member solution, with a disparity between the largest and smallest districts of 9.7%, and the House acquiesced. The House, which less frequently sought the advice of the State's Attorney General, independently produced a redistricting act heavily weighted towards multi-member districts and with an overall variance of over 23%—and the Senate acquiesced.

The reapportionment "balance" claimed by appellant Mahan *et al.* was not the result of careful overall planning—it just happened. Any balancing or compensation between the Senate and House reapportionment plans, if any such existed, was strictly a matter of accident.

In the light of all these developments, it can no longer be said that Virginia has an unbroken custom or tradition to maintain the integrity of political subdivisions in reapportionment which justifies the large population variations between House of Delegate seats in the General Assembly's 1971 Delegate plan. Under the circumstances, appellants cannot seriously rely on such a defense here.

Appellee can do no better at this point than to quote the following extract from the opinion of a three-judge court in *Long v. Docking, supra,* which struck down just such a defense in a Kansas reapportionment case:

> We do not insist that the "one man, one vote" doctrine contemplates that a state legislative body shall apportion the state senatorial districts so that all such districts must be *exactly* equal in population. But . . . where "county lines were ignored in a sufficient number of instances to such an extent that the plan or pattern manifested an intention to disregard them," then under a plan of reapportionment which ignores political subdivision lines, it is not permissible to deviate from the equal population *principle* in either or both houses of a State Legislature. 282 F. Supp. 258.

III

THE 1971 HOUSE OF DELEGATES REAPPORTIONMENT PLAN WAS UNCONSTITUTIONAL BECAUSE IT DISCRIMINATED AGAINST NORTHERN VIRGINIA AND CONVERSELY CONTAINED A BUILT-IN BIAS FAVORING OTHER AREAS OF THE STATE, PARTICULARLY THE TIDEWATER AREA

As stated earlier, almost every House seat in Northern Virginia was under-represented. Alexandria's seats (Twenty-first district, two seats, plus the Alexandria share of the Twenty-third floater district, .39 of a seat, total, the equivalent of 2.39 seats) were close to optimum population, being over-represented by 0.1% (J.A. 10). Except for these seats, all House seats in Northern Virginia were under-represented from 3.9% to 6.3%. Including Alexandria, each House seat in Northern

Virginia was under-represented an average of more than 4.3% per seat (A. 39-40; J.A. 10, footnote).

The Northern Virginia Counties and Cities had a total population of 921,237 persons, according to the final 1970 census figures, which figure was 19.82% of the Commonwealth's total population of 4,648,494. However, under the 1971 House reapportionment act, Northern Virginia jurisdictions were allotted among them only nineteen House seats or 19% of a total of one hundred, although under the 1971 Senate reapportionment act they were allotted eight Senate seats or a full 20% of a total of forty, and under the 1971 Congressional reapportionment act (Code Section 24.1-4.1) they were allotted two Congressional seats or a full 20% of a total of ten (A. 75). (They also received two congressional seats under the 1972 act, Code Section 24.1-4.2.)

These instances of invidious discrimination were and are particularly unfair and discriminatory in that Northern Virginia Counties and Cities as an area comprise the fastest growing region in the Commonwealth by far. During the 1960-1970 decade Northern Virginia grew at an average annual rate of 4.4% as compared with a State-wide average of 1.6%. Average annual growth rates varied from .06% for the City of Falls Church (population 10,772) to 4.2% for Loudoun County (37,150), 6.2% for Fairfax County (455,021), and 8.3% for Prince William County (111, 102) (A. 67, p. 2).

In contrast, a majority of the House districts in the Tidewater area and most of the jurisdictions therein with a majority of the population were over-represented. In particular, the City of Norfolk, with a population of 307,951, was given seven House seats (Thirty-ninth district), each of which had a population of 43,933; thus

the Norfolk district and each of such seven seats were over-represented by 5.4%.

The City of Chesapeake, with a population of 89,580 was given two House seats (Thirty-eighth district) each of which had a population of 44,790. Thus, the Chesapeake district and each of such districts were over-represented by 3.6%. In addition, Chesapeake shared with Virginia Beach and Portsmouth a "floater" House seat (Forty-second district). The weighted value of the Chesapeake "floater" district was 24% of a full House seat (i.e. the proportion that the Chesapeake population of 89,580 bore to the total floater district population of Chesapeake, Virginia Beach and Portsmouth of 372,649). Since under the legislative redistricting plan Chesapeake was accorded the equivalent of 2.24 House of Delegate seats, the population per seat was 39,991, and Chesapeake was over-represented by 14%.

The seat awarded Nansemond and Suffolk with a total population of 45,024 was over-represented by 3.2%, while the House seat awarded to Southampton, Franklin City and Isle of Wight with a total population of 43,747 was over-represented by 5.9% (A. 43; J.A. 29-30; J.A. 4, footnote; cf. A. 81-83).

During the decade 1960-1970 the average annual growth rate for all of the jurisdictions in the Tidewater area was only 1.4% or less than one-third of the average annual growth rate (4.4%) of all Northern Virginia jurisdictions. For the 1970-80 decade the average annual growth rate for all of the Tidewater jurisdictions is estimated by the Commonwealth to be 1.3%, or less than half the estimated average annual growth rate for all Northern Virginia jurisdictions of 3.1% (A. 67, pp. 2, 4).

In *Abate v. Mundt, supra,* The Supreme Court said:

> Of course, this Court has never suggested that certain geographic areas or political interests are

> entitled to disproportionate representation. . . . Accordingly, we have underscored the danger of apportionment structures that contain a built-in bias tending to favor particular geographic areas or political interests, or which necessarily will tend to favor, for example, less populous districts over their more highly populated neighbors, see *Hadley v. Junior College District*, 397 U.S. 50, 57-58, 90 S. Ct. 791, 795-796, 25 L.Ed. 2d. 45 (1970). 403 U.S. at 185-6.

Appellee insists that the 1971 House of Delegates reapportionment act falls within the proscription of *Abate v. Mundt*—since it is an apportionment structure which clearly discriminates against one geographic area, Northern Virginia, and conversely has a "built-in bias" favoring other geographic areas of the Commonwealth of Virginia, particularly the Tidewater.

In this connection, the opinion of the District Court found "pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater" (J.A. 18). The court said (J.A. 17-18):

> Previously, we have alluded to the difficulty of equalizing districts when there is an over-represented group and there is no adjacent district which is under-represented. Examination of the delegate plan just outlined will reveal that this situation is sharply manifest in the Legislature's plan in districts 39, 43 and 44—City of Norfolk and Nansemond, Southampton and Isle of Wight counties—located in the Tidewater area. They are characterized by under-population of 4.8% and thus over-represented. Districts 18, 19 and 20 are a group in Northern Virginia non-contiguous to the under-populated districts of Tidewater. They are beset with an over-population with an average of 5.4%.

Actually, this is the apple of discord between the parties plaintiff in *DuVal-Parris* and the defendants

who are upholding the current legislation. The only solution is the transfer of a delegate from Tidewater to Northern Virginia, and it must be ordered. This is the only instance in which a delegate is transferred from one sector of the State to another. It is justified by the pervasive under-representation in districts in Northern Virginia, and over-representation in Tidewater, as earlier explained.

The 1971 House of Delegates reapportionment act is invalid because, as determined by the lower Court, it contains built-in discrimination against the geographic area of Northern Virginia and, correspondingly, a built-in bias in favor of other areas of Virginia, particularly the Tidewater area.

IV

THE DISTRICT COURT WAS FULLY JUSTIFIED IN DISCARDING THE 1971 HOUSE OF DELEGATES REAPPORTIONMENT PLAN AND PREPARING ITS OWN PLAN

Appellee submits that the decision of the lower Court to judicially apportion the General Assembly, as set forth in its opinion and order of July 2, 1971, rested on sound considerations.

The General Assembly first met in special session on reapportionment on January 6, 1971. Its statute reapportioning the House of Delegates was approved March 1, 1971, and was promptly attacked through the suit filed by appellee DuVal and other Northern Virginia plaintiffs on March 5, 1971. Four times thereafter the General Assembly reconvened its special session on reapportionment, but on each occasion declined to change its unconstitutional House of Delegates reapportionment

plan, despite repeated warnings by appellee DuVal, then a State Delegate, and other legislators, of its invalidity and despite the pending court actions against the plan. Despite these warnings, the General Assembly—and specifically the House of Delegates, which, as already pointed out, actually made all of the decisions regarding the provisions of the lower house redistricting plan—adamantly clung to its invalid reapportionment scheme.

Further, time was of the essence, since Virginia primary elections had already been postponed by order of the lower Court (J.A. 43-45) from June 8 to September 14, 1971. Thus, on July 2, 1971 these elections were only some ten weeks away. Candidates for the General Assembly running from revised districts in the primary elections were required by the State's Election Law (Va. Code 24.1-184), as interpreted by an opinion of the Virginia Attorney General, to file not later than sixty days prior to the new primary date, to wit, by July 16, 1971. A contraction of the filing period or further postponement of the primary election would have been chaotic for candidates and would have prevented any semblance of an orderly election process in Virginia during the Fall of 1971.

In other words, the District Court simply did not have time to refer the unconstitutional redistricting plan back to a stubbornly resisting General Assembly, subsequently review whatever action the Assembly might take, correct the new plan as necessary, and order it into effect—at least without seriously interfering with Virginia's election processes.

In *Reynolds v. Sims, supra,* the Supreme Court noted that "We do not consider here the difficult question of the proper remedial devices which Federal courts should

utilize in state legislative apportionment cases." 377 U.S. at 585. However, the Court indicated that lower courts would have wide latitude in developing "remedial techniques," and that these "... will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions" (585).

In a further comment particularly appropriate to the present case, the Court said:

> In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. 377 U.S. at 585.

This the lower court proceeded to do. It transferred one Delegate seat from the Tidewater area to Northern Virginia, thus eliminating one of the principal vices of the legislature's House of Delegates reapportionment plan, i.e., the built-in discrimination against Northern Virginia and the built-in bias in favor of Tidewater.

In so acting, the District Court utilized well-documented findings as to population trends throughout Virginia, in the form of an official State document making population projections for the Commonwealth over coming decades (A. 67). This the lower court was certainly entitled to do.

In *Davis v. Mann, supra,* this Court indicated that growth rates are valid considerations. See footnote 4 to this Court's opinion in that case (377 U.S. at 688), where the Court noted with apparent approval plaintiff-appellees' contention that under-representation of rapidly growing areas would worsen significantly over the period before the next reapportionment.

In *Kilgarlin v. Hill, supra,* this Court approved the temporary over-representation of one legislative district as compared with another district because the population of the first district was "growing rapidly." This Court said there:

> Appellants complain that district 24 in Harris County is assigned only six representatives whereas district 22 in the same county with a slightly smaller population is assigned seven representatives. The court found the record to establish that the population in district 22 was growing rapidly as compared with district 24 and would soon justify the extra representative. This factual determination not being challenged here, we accept the ruling of the District Court regarding these districts. 386 U.S. at 125-126.

More recently, this Court said in *Kirkpatrick v. Preisler, supra*:

> Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, states that are redistricting may properly consider them. 394 U.S. at 535.

Population growth in Northern Virginia is so dynamic that if the lower court had not given the region a twentieth Delegate seat, official State estimates indicate that each of the nineteen Delegate seats allocated to Northern Virginia under the General Assembly's plan would as of August 1, 1972, already be under-represented by about 12% per seat, assuming the population norm per Delegate seat continued to be 46,485 persons. On the same basis, even with the twenty seats allocated by the District Court, it is estimated that each Delegate seat in Northern Virginia is under-represented as of the same

date by about 6% per seat. In fact, the estimated August 1, 1972 population of Northern Virginia of some 985,000 persons would entitle it to representation by twenty-one Delegates representing 46,485 persons per seat.[14]

In addition to correcting the discrimination against Northern Virginia built into the General Assembly's House of Delegates redistricting plan, the District Court also acted to eliminate or greatly reduce other significant population inequalities manifest in the legislature's plan.

The lower court did this in a reasonable way, seeking to continue in effect the General Assembly's House of Delegates plan to the extent constitutionally practicable. Unconstitutional deviations from the population norm among the various Delegate districts were corrected by adding or subtracting population units, utilizing for such units existing political subdivisions or descriptions provided by the United States Census Bureau. This necessitated a disregard for political subdivision lines in the case of twelve counties and cities out of a total in all of Virginia of one hundred thirty-four. As stated by the District Court (J.A. 4-5):

> These unconstitutional disparities can be remedied in most instances by merely shifting district lines, leaving undisturbed the numerical allocation of delegates to districts. It is an adequate remedy whenever mal-apportionment arises from over-population in a district which is contiguous to one or more under-populated districts. We have

[14] See A. 67, p. 2, which projects on average annual growth rate for Northern Virginia of 3.1%. Assuming that the 1970 Census figure for Northern Virginia of 921,237 persons was final as of May 1, 1970, the population of Northern Virginia on August 1, 1972, would project at some 985,820 persons.

endeavored to pursue this adjustment wherever feasible because it fosters the clear preference of the Assembly to adopt recognized political subdivision lines in apportioning delegates.

* * * * *

The source of every change is either existing political subdivisions or the descriptions provided by Enumeration Districts (ED), Block Groups (BG) or Census Tracts (CT) provided by the United States Bureau of the Census for 1970.

The District Court's redistricting plan for the House of Delegates was not only reasonable but also equitable in that it significantly reduced the dilution or debasement of Virginians' right to vote inherent in the General Assembly's reapportionment plan.

Excluding the Accomack County-Northampton County seat (Forty-sixth district), the range in the Court's plan between largest and smallest districts is but 7.2%. Including the Forty-sixth (over-represented in the Court plan by 6.5% because the two counties are isolated by Chesapeake Bay from the rest of Virginia) the range is 10.3% (J.A. 21-22). Since the variation between largest and smallest district in the Assembly plan was 23.6% (J.A. 4), it is evident that the Court's plan took a huge step towards the goal of insuring that the vote of every Virginian in any State election counts as much as that of any other resident of the Commonwealth.

It is, of course, people who vote—not land or trees or pastures or political subdivisions (*Reynolds, supra,* 377 U.S. at 580-581). And for all electoral districts, congressional, state or local, the basic principle of population equality equally applies.

As stated by the Supreme Court in *Hadley v. Junior College District,* 397 U.S. 50, 54, 90 S.Ct. 791, 794, 25 L.Ed. 2d 45 (1970):

> This Court has consistently held in a long series of cases that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement.

Appellee submits that the lower court was required to reject the 1971 House of Delegates statute as unconstitutional under rulings of this Court most recently reiterated in *Abate v. Mundt, supra*; further, that since time was of the essence The District Court had no alternative but to prepare its own plan; and finally that the lower court's plan is reasonable and meets all constitutional tests laid down by this Court.

V

EVEN IF, ARGUENDO, THE INTERLOCUTORY ORDER OF THE DISTRICT COURT WAS ISSUED PRECIPITOUSLY OR WENT TOO FAR, THE LOWER COURT'S HOUSE OF DELEGATES REAPPORTIONMENT PLAN SHOULD NOT BE DISTURBED AT THIS STAGE, SINCE THE ACTION OF THE LOWER COURT IS NOT FINAL AND ANY INVALIDATION OF ITS PLAN WOULD OUST THE ONLY LEGISLATURE VIRGINIA NOW HAS

As pointed out earlier, elections to the Virginia General Assembly were held on November 9, 1971, under the District Court's plan. Legislators were elected to both Houses, and the Assembly as thus reconstituted conducted the State's legislative affairs and enacted laws governing Virginia at the regular session held January-March, 1972.

At the present time, the General Assembly elected under the lower court's plan is the only legislature the Commonwealth has. If this Court were to grant appellants' primary request to affirm the validity of 1971 reapportionment plans adopted by the Virginia legislature and declare unconstitutional the District Court's plans, the result would be to oust many present members of the Assembly.

Such an attempt to unscramble the eggs could accomplish no useful purpose and would create a legislative vacuum in Virginia. It would be costly to the taxpayers of the Commonwealth, confusing to voters, difficult for legislative candidates, and surely not in the best interest of the people of Virginia.

In *Connor v. Williams, supra,* a somewhat similar situation confronted this Court. Elections had been held for the Mississippi legislature under a plan fashioned by the District Court. Under the lower court's plan there was a total variance between the populations of the largest and smallest districts of 18.9% as to Senate districts and 19.7% as to House districts. The Supreme Court said that this raised "substantial questions concerning the constitutionality of the District Court's plan as a design for permanent apportionment." 92 S.Ct. at 658.

However, the Supreme Court noted that the District Court had retained jurisdiction to conduct hearings as to certain multi-member House districts. Under these circumstances, this Court declined to disturb the elections held under the District Court's plan, stating:

> Pending completion of those proceedings [in the lower court], we deem it inappropriate to give further consideration to this case. If we are to consider the applicability of *Preisler* and *Wells* to

> state legislative districts, it would be preferable to have before us a final judgment with respect to the entire State. 92 S.Ct. at 658.

As in *Connors v. Williams,* here too the lower court has retained jurisdiction of the matter, and the instant appeals are from an interlocutory order.

At the past 1972 Session of the General Assembly, the Virginia legislature, if it had so desired, could have enacted a new redistricting plan for either or both Houses of the legislature. In such a plan, the legislature could have amended the lower Court's plan in any way it saw fit so long as constitutional requirements were met. As pointed out in *Connor v. Williams, supra,* in footnote 4 of this Court's opinion:

> Meanwhile, it is possible that the state legislature will adopt a plan of its own. During the course of this litigation, the District Court has emphasized that "the exercise of this unavoidable judicial duty [drafting an apportionment plan] cannot, *does not, and will not in any way tie the hands of the Legislature at any time* to adopt and enact any plan of its own for the reapportionment of its membership so long as it complies with Constitutional requirements." *Connor v. Johnson*, 265 F. Supp. 492, 494 (S.D. Miss. 1967) (emphasis in original). 92 S.Ct. at 658.

However, the General Assembly did not elect to do so. Specifically, the House of Delegates did not even consider, much less enact any change or amendment of the District Court's Delegate plan.

The option of adopting new redistricting legislation still remains open to the General Assembly at either a

special session[15] or at the regular session to be convened in January, 1973. Since a new House of Delegates will not be elected until November, 1973, and a new Senate will not be elected until November 1975, the General Assembly could if it so desired, at either a special session or the 1973 regular session, enact new reapportionment legislation without any disruption of Virginia's election process. For example, if the Assembly so elects, such new statute could modify those aspects of the lower court's plans complained of by appellant City of Virginia Beach which specifically relate to the legislative representation of that municipality.

If the Assembly does enact new reapportionment legislation for the House of Delegates, such act could, of course, and presumably would be submitted for review to the District Court, which has retained jurisdiction herein. If the General Assembly's new plan is then approved or modified by the District Court and appeals are again taken to this Court, the situation deemed desirable by this Court in *Connor v. Williams, supra,* would in fact exist—i.e. this Court would have before it "a final judgment with respect to the entire State" (92 S.Ct. at 658), a situation that does not now exist. There would be time enough then for this Court to consider whatever the final reapportionment structure for Virginia turns out to be and to take whatever action is then appropriate.

If, on the other hand, the General Assembly fails to enact a new redistricting statute for the House of

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[15]Under Article IV, Section 6 of the Constitution of Virginia, the Governor must "Convene a special session upon the application of two-thirds of the members elected to each house," or he "may convene a special session of the General Assembly when, in his opinion, the interest of the Commonwealth may require . . ."

Delegates, the Assembly's continued inaction would demonstrate that it no longer has objection to the lower court's plan.

Failure of the General Assembly to even consider new reapportionment legislation at the 1972 session would indicate that the House of Delegates, which in 1971 specifically requested the Virginia Attorney General to seek reversal of the District Court's reapportionment plan by an appeal to this Court, has now changed its collective mind and is content to abide by the District Court's plan.

As a practical matter and under all the circumstances here present, appellee submits that it is unnecessary and highly undesirable for the Supreme Court to give further consideration to this case at this stage.

CONCLUSION

For the reasons set forth above, appellee respectfully requests this Court to affirm the decision of the lower court as reflected in the interlocutory order of the United States District Court for the Eastern District of Virginia entered on July 2, 1971, to the extent that such order declared invalid the 1971 House of Delegates reapportionment act and reapportioned the Virginia House of Delegates. (This appellee takes no position on the portion of such order modifying the 1971 Senate reapportionment act). In the alternative, appellee respectfully

requests this Court to dismiss the appeals in their present stage without prejudice.

Respectfully submitted,

CLIVE L. DuVAL, 2d
2007 North Fifteenth Street
Arlington, Virginia 22201

Appellee pro se

Of Counsel:

EDMUND D. CAMPBELL, Esquire
Suite 822, 1425 H Street, N.W.
Washington, D.C. 20005